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IN THE

Supreme Court of the United States

October Term, 1961

No. 844

LOUIS F. FOX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH JUDICIAL CIRCUIT

C. ANTHONY FELOUX, JR.
Counsel for Petitioner
2010 South Coast Bldg.
Houston, Texas

BORDEN PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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In The

Supreme Court of the United States

October Term, 1961

No. .....

Louis F. Fox, *Petitioner*,

v.

United States of America, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Judicial Circuit

Petitioner, Louis F. Fox, Jr., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on the 7th day of December, 1961, and its denial of Petitioner's motion for re-hearing entered by said court on the 8th day of February, 1962.

CITATIONS OF OPINIONS BELOW

The opinion of the Court of Appeals printed in Appendix B, affirms the convictions and judgment on all counts of the indictment.

JURISDICTION

Judgment of the Court of Appeals was timely entered on the 7th day of December, 1961, page 2a, *infra*. Timely petition for re-hearing was filed and was then denied on the 8th day of February, 1962. Jurisdiction of this Court is invoked under Title 28, U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED

The prosecution of Petitioner for alleged violations of Title 18, Section 657, U.S.C.A., under Criminal Indictment numbered 6451, includes four (4) counts of embezzlement, and presents the following questions:

I.

Does the practice of the District Courts of the Southern District of Texas in uniformly denying the Defendant the right to limited interrogation of the prospective jurors violate the letter and intent of Rule 24(a), Title 18, U.S.C.A.

II.

Does the comments and remarks of the trial court to the jury, during the charge, exceed the discretionary authority of the said court by asserting undue influence on the jury.

III.

Do the comments and instructions by the trial court, to the jury during their deliberations on the case, constitute prejudicial error.

STATUTES INVOLVED

The statutes involved in the questions pending before this Honorable Court are as follows: Title 18, Rule 24(a)

U.S.C.A., cited as Appendix A, Page 1a; Title 18, 657.
U.S.C.A., cited as Appendix A, Page 1a.

STATEMENT

The Petitioner was convicted in the United States District Court for the Galveston Division of the Southern District of Texas, under an indictment charging a violation of Title 18, Section 657, U.S.C.A.

The charges allege certain transactions constituting embezzlement of funds on four (4) loan transactions, wherein the discount fee or charge was received by Petitioner, while allegedly belonging to the association of which he was President, and then converted to his own use.

The case was tried by jury after the court refused the Petitioner the right to limited examination of the prospective jurors, under a local district practice of denying without consideration, the request for such right.

After the conclusion of the presentation of evidence in the case the court, during his charge to the jury, made an extensive summation of the government's proof, but did not discuss the proof submitted by the defense.

After instruction, the jury retired to consider their verdict. After deliberation of some four hours, the court had the jury return to the court room and asked if they had reached a verdict. The answer was negative.

The court commented on this failure and the jury withdrew until 5:05 P. M. or some two hours later and returned, reporting it was hopelessly deadlocked.

At this time the court released the jury for three days. When they returned to deliberate on the fourth day, the court again made numerous remarks to the jury.

After additional consideration, the jurors finally arrived at a verdict of guilt.

The comments of the court to the jury were as follows:

(a) After some five hours deliberation, the jury returned and the court said: "You ladies and gentlemen have had our case under consideration for some five or six hours, now you have not reached a verdict?" The Foreman: "Your Honor, we have not." The Court: "Well I am somewhat surprised at that fact. It was a case I thought there was very little dispute in the evidence, and I thought that you all probably would have come to a conclusion prior to this time. The Court continued: Well, suppose you take a recess — and each of you jurors, it occurs to me, should carefully examine his own views in the light of what the argument, and so forth, which the jurors of the other view may advance, and see if you can't arrive at a unanimous verdict."

(b) After the three (3) day recess the jury returned and the Court said: "This case presents little conflict in the evidence, I believe, and I am very reluctant to declare a mistrial, unless it becomes necessary that I do. So, in view of the fact that we can't deliberate tomorrow, I am telling you now, that if you can't reach a verdict, I will discharge you this evening, and not keep you together so long that you may feel that you might have to surrender your views before you are going to be excused. However, we will work this evening and to a fairly late hour, if it is necessary for you all to give this matter the careful consideration that I am sure you wish."

These remarks were highly prejudicial to the Petitioner.

Petitioner made a motion for new trial on these grounds, which was promptly denied.

The appeal was timely submitted and denied as reflected herein.

REASONS FOR GRANTING THE WRIT

The denial of Petitioner's pre-trial motion pursuant to and under the provisions of Rule 24(a), Title 18, U.S.C.A. requesting the trial court to allow counsel for the defense the right to interrogate the individual jurors on voir dire because of the *agreed practice of the district not to consider the motion* was error.

The trial court in its denial stated:

> "Now let's see, Mr. Frioux, you have asked to interrogate the jurors personally. We, as you know, follow the contrary practice."

The Court, in its denial of the Petitioner's motion, made a realistic inquiry impossible. The brief, general questions to the panel make it impossible for an intelligent exercise of the Defendant's right to challenge for cause, as well as rendering the peremptory challenge a matter of rank speculation.

While there is the undisputed discretionary power vested in the trial judge under Rule 24(a), the action of the local district, in adopting the uniform procedure of denying the right to even limited interrogation of the jurors to *all defendants*, circumvents the true import and purpose of the rule.

The preservation of the right, and opportunity to prove actual bias, is a guarantee of the defendant to an impartial trial by jury. *See Dennis* v. *U. S.*, 339 U.S. 162; *Morford* v. *U. S.*, 339 U.S. 258; *Wagner* v. *U. S.*, 264 F. 2d 524.

The Fifth Circuit, in the *Spells* case[1] held in essence with the view Petitioner now presents to the Court; al-

[1] Spells v. U.S. (5 Cir., Tex.), 262 F. 2d 699, cert. den. 360 U.S. 920.

though the Fifth Circuit did not consider its previously stated view controlling in this cause.

A defendant can never adequately determine the intrinsic and intangible factors leading to a particular jury's decision.

The time to properly determine the existence of any disqualification was on voir dire.

The adoption of this district procedure eliminated the right to "discretion" afforded by the Rule. (T. 18, R. 24 I. S. C. A.)

The record is devoid of any challenge for cause, and counsel for Petitioner has rarely seen a juror in a Federal venire stand up in front of the entire panel and admit to prejudice of any sort.

The practice of arbitrarily denying the individual trial judge the right to exercise his discretion on each case, after considering the type case, the atmosphere of the community, and the make up of the panel, effectively circumvents and makes inapplicable the intent of Congress in allowing each judge this discretionary authority.

Petitioners will acknowledge that unlimited interrogation, or questioning, would be just as undesirable as allowing no interrogation.

Even hearing a juror speak is of some importance to trial counsel as he tried to look at faces, at listed occupations, and then began the impossible mental gymnastic of trying to select a jury which enters the trial with an open mind free from prejudice.

This district practice in actuality, amounts to the denial per se, without independent consideration, of what every defense counsel considers a very vital and necessary substantive trial right.

U. S. ex. rel. Darcy v. Handy, 130 F. Supp. 270.

Question II. The trial court's comments to the jury, wherein the court felt compelled to "explain" to the jury just what the prosecution had proved or tried to prove, could have had no other effect, particularly when viewed in conjunction with the later remarks to the jury, during its deliberations, than to indicate to the jury that he felt that there was no basis in fact, in failing to quickly arrive at a verdict of guilty.

The trial court need not, of course, summarize the evidence; but if he does so, the summary must be fair and adequate, and must not be one-sided. *Williams* v. *U. S.*, 93 F. 2d 665, *Billeci* v. *U. S.*, 184 F. 2d 394; *Carney* v. *U. S.*, 295 F. 606.

Even though this power is discretionary yet — "the greatest caution should be used in the exercise of this power, and the jury should *be free* and untrammeled in the determination of the questions of fact, which are to be passed on by them." *Foster* v. *U. S.*, 188 F. 305.

There is no dispute that it is of the utmost importance that the charge, instructions, and comments thereon do not give undue prominence to a part of the charge.[3]

The attitude of disinterestedness, which is the foundation of a fair and impartial trial must be maintained by the trial court.[4]

While the power to comment, and or summarize is discretionary, the trial judge must avoid becoming an advocate of either side of the pending controversy, which is required by the conflict of the evidence, to be submitted to the jury is a fundamental and essential rule of especial importance in a criminal case.[5]

[3] Perovich v. U.S. 205 U.S. 86; Colburn v. U.S., 233 F. 59 cert den. 239 U.S. 643.
[4] Williams, Supra.
[5] Alder v. U.S.; 182 F. 2d 464.

In the instant case, the attention of the court is directed to the comments and opinion of the trial court, as shown in the record. (see R. 308, 309, 310, 312 and 313)

The summarization of the government's position, coupled with the failure to summarize the evidence favorable to Petitioner, made the Court an advocate of the prosecution.

A careful reading of the entire summarization will make clear to the court Petitioner's position thereto.

Question III. When standing alone, the comments to the jury do not have their full impact; but when considered along with the comments, remarks and summarization of the case for the prosecution, the real impact of the court's influence can readily be felt.

The court's obvious annoyance with the jury's failure to quickly arrive at a verdict; his subsequent remarks that the evidence was clear, and that he expected them to reconsider after they reported hopelessly deadlocked shows the full impact of his influence on this jury.

CONCLUSION

A. Because of the seriousness to all defendants who stand trial, to have a fair and impartial jury, it is necessary that the court clearly indicate its view on the right of various districts to adopt local rules eliminating the *discretionary right* of the *individual trial judge* to grant or deny full or limited interrogation, after consideration of the facts incident to each individual case.

Petitioner submits this practice constitutes a direct avoidance of this important and critical discretionary power of the individual court, which place defendants in a position of extreme prejudice, and constitutes reversible error.

B. The remarks of the trial court taken together with his comment and conduct concerning the jury during deliberа-

tion rendered a fair and impartial consideration impossible and constituted error.

Respectfully submitted,

.....

C. ANTHONY FRILOUX, JR.

Counsel for Petitioner
2010 South Coast Bldg.
Houston, Texas

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to Woodrow Seals, United States Attorney, 218 Post Office Building, Houston 2, Texas, and to Solicitor General, Department of Justice, Washington 25, D.C., postage prepaid, on this ..... day of March, 1962.

.....

C. ANTHONY FRILOUX, JR.

APPENDIX A

A. Rule 24(a) covering trial jurors provides in part:

(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

B. 654. Officer or employee of United States converting property of another

Whoever, being an officer or employee of the United States or of any department or agency thereof, embezzles or wrongfully converts to his own use the money or property of another which comes into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or employee, shall be fined not more than the value of the money and property thus embezzled or converted, or imprisoned not more than ten years, or both; but if the sum embezzled is $100 or less, he shall . . . .

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH DISTRICT

No. 18820

LOUIS F. FOX, JR.,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(December 7, 1961)

Before TUTTLE, Chief Judge, and HUTCHESON and RIVES, Circuit Judges.

PER CURIAM: The appeal presents no showing of substantial error, and for the reasons hereafter stated, we affirm the judgment of the trial court.

Appellant was indicted, tried before a jury, and convicted on four counts of embezzlement in violation of 18 U. S. C. 657 in the United States District Court for the Southern District of Texas. He was sentenced to imprisonment for a period of thirteen months and fined eight thousand dollars.

Errors assigned are: the failure of the trial court to allow appellant's counsel to interrogate individual jurors; the alleged failure of the trial court to fairly and adequately sum up the appellant's theory of defense; alleged prejudicial comments and instructions to the jury during deliberation; and insufficiency of the evidence to support the jury verdict.

The procedure to be followed in the examination of jurors is within the discretion of the trial judge. Fed. R. Crim. P. 24 (a). The latter rule has been adopted by the United States District Court for the Southern District of Texas in its Rule 32. The trial judge in this case, in refusing permission to interrogate the jurors individually, neither abused his discretion, nor, in stating: "We . . . follow the contrary practice [to personal interrogation of jurors]", did he assert the existence of a rule for the Southern District of Texas contrary to its Rule 32 and Fed. R. Crim. P. 24 (a). In any event, no prejudice to appellant is shown.

The comments and charge of the trial judge were fair and impartial and were not erroneous. The same is true of the comments and instructions to the jury during its deliberation. The verdict of the jury is fully supported by the evidence.

The judgment is

AFFIRMED.

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No. 844

In the Supreme Court of the United States

October Term, 1961

Louis E. Fox, Petitioner

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

[redacted]
Solicitor General
[redacted]
Assistant Attorney General
[redacted]
Attorney
Department of Justice
Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 844

LOUIS F. FOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 359–360; Pet. App. 2–3) is reported at 296 F. 2d 217.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1961 (R. 361). A petition for rehearing was denied on February 8, 1962 (R. 366). On March 2, 1962, Mr. Justice Black extended the time within which to file a petition for a writ of certiorari to and including March 30, 1962. The

petition was filed on April 4, 1962.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly exercised its discretion in refusing to permit defense counsel to participate in the interrogation of prospective jurors.

2. Whether the trial court's instructions and subsequent statements to the jury were proper.

RULE INVOLVED

Rule 24a of the Federal Rules of Criminal Procedure provides:

> (a) *Examination.*
>
> The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on each count of a four-count indictment charging that he embezzled funds belonging to the Bankers Savings and Loan Association of

[1] As we discuss *infra*, p. 9, the petition was filed out of time.

Galveston, Texas, a federally insured savings institution (R. 6–12, 325, 345). Petitioner was sentenced to imprisonment for a term of thirteen months on each count, the sentences to run concurrently. He was also fined a total of $8,000 (R. 343, 346–347). The court of appeals unanimously affirmed his conviction (R. 359–360; 256 F. 2d 217; Pet. App. 2–3).

A. THE FACTS OF THE CRIME

1. Petitioner was president of the Bankers Savings and Loan Association (hereinafter referred to as Bankers) from 1946 until April 1960 (R. 71, 222, 254), and was in direct charge of the bank's loan department. He decided whether or not the bank should purchase promissory notes, inspected the property which was to be the security for the notes and issued the checks when such notes were purchased (R. 146–147, 157, 235–236, 257). On various dates in 1958 and 1959, the four obligations which are the subject matter of the present indictment (R. 6–12)—the Sowell (count 1), Dooley (count 2), Velasquez (count 3), and Sims (count 4) notes—were purchased by Bankers from Ralph Burns, a building contractor (R. 176–177, 183–184, 188–195). These notes represented amounts owing to Burns for home construction and improvement (R. 61–62, 172). The pattern of the embezzlement was the same as to each of the notes, and may be fairly illustrated by the "Sowell" transaction.

Bankers purchased the Sowell promissory note, amounting to $5,000, from Burns on December 8, 1959 (R. 61, 176). On December 9, 1958, a $4,500

check was issued by Bankers as the purchase price for the note to the Commercial Title Company which had acted as escrow agent in the disbursement of the funds and issued the title insurance on the loan.[2] Papers accompanying this check stated that $500 had been deducted for "the agreed ten per cent discount" (R. 166; see also R. 63–64). Mr. Ralph Burns testified that he received $4,500 as payment for the sale of the Sowell note to Bankers and did not expect any further payment therefor (R. 176–177).

On the same date that the $4,500 check was issued to Burns, Bankers issued another check payable to the American Title Guaranty Company in the amount of $500 which was charged to the Sowell account on the Bankers' records (R. 59–60). The American Title Guaranty Company had not handled the title insurance on this note nor was it involved in any way at all with the loan (R. 62–63, 76–77, 254–255). The evidence showed, and petitioner admitted, that petitioner had caused this check to be so drawn and that he had thereafter stamped the endorsement of American Title Guaranty Company on the reverse side, cashed the check and used the proceeds for his own private purpose (see R. 145–147, 209–211, 225–226, 228, 234, 238–239, 255–259, 261), *i.e.*, the purchase of a family automobile (R. 125–130, 132–138, 143, 245).

The evidence further revealed that in September and October 1959, when these transactions came to the attention of an examiner for the Texas Department of

[2] Commercial Title Company also handled arrangements on the other three loans (R. 163–173).

Banking, petitioner was asked whether the amounts of the checks made payable to American Title Guaranty Company had been paid to Mr. Burns. Petitioner said that the money had been paid to Burns and that he would provide the receipts evidencing the payments (R. 92–98, 115). Thereafter, petitioner delivered to Mr. Burns the amount of discounts on each note and, in exchange, obtained from him back-dated receipts and related correspondence purporting to show that Burns had received the monies prior to the State investigation (See R. 175–190). Petitioner sent these back-dated receipts to the Department of Banking of the State of Texas (R. 118–127).

2. Petitioner testified in his own behalf (R. 221–293), and admitted that he had issued the checks, endorsed them and cashed them for his own use (R. 238–239, 255–256). His defense was that he had believed at that time that he was entitled to the monies because of the services he had rendered in purchasing the notes. As he explained it, since Bankers had a long-standing policy against purchasing notes at a discount (R. 239, 263–264), "there wasn't any reason why, since the discounts were available that [they] should be paid to the builder who was willing to give them up" (R. 256, 257–258, 265, 270–273). Petitioner stated that he did not inform the Board of Directors at Bankers that he was taking a service charge on the purchase of the

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When asked why he had ultimately returned these funds to Mr. Burns, petitioner testified that although he had originally thought that he was entitled to the discounts he subsequently "had learned otherwise" (R. 271).

notes (R. 258, 262), and that he had not made the checks directly payable to himself because he did not want the employees at Bankers or other banks in Galveston to know his personal business (R. 259–260).

B. THE JUDGE'S INSTRUCTIONS AND SUBSEQUENT STATEMENTS TO THE JURY

1. At the outset of his instructions, the trial judge advised the jury that although he intended to discuss the evidence, he had no personal opinion as to where the "truth of the matter lies," nor did he desire to express "any personal views about the matter" (R. 301). His sole aim, he stated, was to assist the jury in its consideration of the case; they were "entirely warranted and justified in disregarding anything [he said] * * * about the evidence" (R. 302; see also R. 311). After observing that the weight of the evidence and the credibility of the witnesses were issues for the jury (R. 299–301), explaining the presumption of innocence and reasonable doubt (R. 302–303), and outlining the charges against petitioner (R. 303–306), the court emphasized that knowledge and wilfulness were essential ingredients of the crime and defined these terms for the jury (R. 305–307).

At this point, the Court stated summarily the theory of the government's case. As the judge described it, Bankers would purchase a promissory note at the discount but, instead of paying the discounted price as agreed, the bank would end up paying the face value of the note because petitioner would issue a check in

the amount of the discount which he cashed for his own purposes (R. 308–310).

The court then described the defense position (R. 311–312). It observed that although petitioner did not "deny * * * any of these matters" (R. 311), he explained his actions on the ground that "he did not consider that he was doing anything wrong; that he thought these funds were due and owing to him" (R. 312).

At the close of the instructions, defense counsel objected "to the presentation of the Government's theory in its detail" (R. 316), stated that the court had not set forth fully to the jury the basic defense contention that petitioner had not intended to "defraud his company, nor * * * to embezzle the funds" and requested the court to define the word intent for the jury (R. 316; see also R. 314–315). The judge denied the request, pointing out that he had informed the jury as "clearly" as he could that they had to find intent in order to convict and that he had "defined the several terms that make it up" and did not believe he could "add to it" (R. 316–317).[1]

2. After the jury had deliberated some four hours, they were returned to the courtroom (R. 318).[2] The trial judge stated that he was "somewhat surprised"

[1] The court had previously charged the jury (R. 306–307):

"An act is done wilfully if done voluntarily and purposely, and with the specific intent to do that which the law forbids, that is to say, with an evil motive or a bad purpose, either to disobey or to disregard the law.

"An act is done knowingly when it is done with knowledge; and that is to be distinguished from an act done by mistake, inadvertence, or any other innocent reason.

"The term unlawfully simply means that the act was contrary to law. The term fraudulent, as I use it here, means that the action was characterized by trickery and deceit."

at their inability to reach a verdict, and that he "thought there was very little dispute in the evidence." He then asked the foreman whether "with a little further consideration," a verdict might be reached, and when the foreman advised that it was "possible," the court sent the jury out for further deliberation (R. 318, 319). About three hours later, the jury was brought back to the courtroom (*ibid.*). The foreman told the court that the jury was "in the process of taking another vote" and that he thought they "should be able to arrive at a verdict" (R. 320). The court thereupon directed that a vote be taken and, if unsuccessful, that the jury be excused over the weekend (R. 321-322). The following Monday morning, after having renewed their deliberations, the jury returned to the courtroom and requested that the testimony of petitioner and Mr. Burns be read over (R. 322). After this was done (R. 323*), the judge said that, while he did not ask a juror to "surrender his conscientious and his sincere convictions," he wanted each one again to make "a serious effort to arrive at a unanimous verdict," and that since the case "presents very little conflict in the evidence," he was very reluctant to declare a mistrial (R. 324). He stated further that, if the jury could not reach a verdict by that night he would discharge them (*ibid.*). Some two hours later the jury returned with a verdict of guilty (R. 325).

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* This occurred late Thursday afternoon. The court stated that matters scheduled before it on the following day in another city made a recess until Monday necessary (R. 321).

ARGUMENT

1. The judgment of the court of appeals was entered on December 7, 1961, and a petition for rehearing was denied on February 8, 1962. On March 2, 1962, Mr. Justice Black extended the time within which to file a petition for a writ of certiorari to and including March 30, 1962. Although the petition for a writ of certiorari was received by the Court on March 30, the record was not received until April 4. The petition was therefore untimely, since "it and the certified record" were not filed within the time for filing, as required by Rule 22(2) of the Rules of this Court.

2. In any event, the decision below is correct.

a. Petitioner asserts that, contrary to Rule 24(a) of the Federal Rules of Criminal Procedure (*supra*, p. 2), the Southern District of Texas has adopted a uniform procedure "of arbitrarily denying the individual trial judge the right to exercise his discretion" to permit defense counsel to interrogate prospective jurors (Pet. 6). Petitioner contends further that the trial court was acting pursuant to this procedure and in violation of Rule 24(a) when it denied his request for permission personally to question the jurors, with the comment, "We, as you know, follow the contrary practice" (R. 32).

Petitioner's first contention is answered by the fact, pointed out by the court below, that Rule 24 has been "adopted by the United States District Court for the Southern District of Texas in its Rule 32" (R. 360; 296 F. 2d at 217; Pet. App. 3). Beyond this, the court's statement is at most equivocal and, standing alone,

insufficient to establish that in this case the trial court failed to exercise its discretion in denying counsel's request to interrogate the jurors. Moreover, after having made careful inquiry into the qualifications and possible biases of the prospective jurors (R. 24–32), the court specifically asked most of the questions submitted by defense counsel (R. 16–18, 32–39).*

b. Petitioner contends that the trial court became "an advocate of the prosecution" (Pet. 7–8) in its original instructions to the jury and by expressing surprise at their difficulty in reaching a verdict. The record does not support the claim.

As we have described in detail in the Statement, *supra*, pp. 6–7, the trial judge gave the jury a fair summary of the case. He clarified an involved factual situation by pinpointing the essence of both the government and defense positions (R. 308–311). There was never any dispute that petitioner issued "discount" checks and then cashed them to his own account. The single question was whether his acts were done with criminal knowledge and intent. Moreover, the judge repeatedly admonished the jury that it was their recollection of the evidence, not his, which should control their decision (see *e.g.*, R. 302, 311).

The trial judge's comments to the jury when they

* Petitioner's reliance (Pet. 5–6), on *Spells* v. *United States*, 263 F. 2d 669 (C.A. 5), certiorari denied, 360 U.S. 920, is misplaced. That case did not involve any question of counsel's participation in the voir dire; rather the only issue was whether the trial judge had abused his discretion in refusing to ask the jurors a question submitted by counsel. Recognizing the broad authority of the trial court in these matters, the court of appeals held that he had not abused his discretion (263 F. 2d at 612–613).

indicated that they were having difficulty in reaching a verdict reveal his scrupulous concern that the jury reach a fair decision on the evidence (see Statement, *supra*, pp. 7–8). His observation that there was little dispute in the evidence was not, as petitioner infers, an attempt to have the jury return a guilty verdict; it was simply a valid characterization of the case. The trial judge exerted no pressure and indicated that the jury would be discharged if agreement could not be achieved. There was no impropriety in his actions.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

MAY 1962.